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Employees Association

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

SAN JOSE POLICE OFFICERS'
ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF
ADMINISTRATION FOR POLICE
AND FIRE DEPARTMENT
RETIREMENT PLAN OF CITY OF
SAN JOSE, and DOES 1-10, inclusive,

Defendants.

AND RELATED CROSS-COMPLAINT
AND CONSOLIDATED ACTIONS.

) Lead Consolidated Case No. 1-12-CV-225926
) (Consolidated Actions 1-12-CV-225928,
) 1-12-CV-226570, 1-12-CV-226574,
) 1-12-CV-227864 and 1-12-CV-233660)

) (Hon. Patricia M. Lucas, Dept. 2)

) **SJREA'S PRE-TRIAL BRIEF**

) Pretrial Conference: July 12, 2013

) Time: 9:00 a.m.

) Dept.: 2

) Trial: July 22, 2013

) Time: 9:00 a.m.

) Dept.: 2

) Complaint Filed: June 6, 2012

TABLE OF CONTENTS

I.	<u>INTRODUCTION</u>	1
II.	<u>ARGUMENT</u>	2
A.	A Long Line Of California Authorities Clearly And Unequivocally Establish That Public Employees Have Vested Contractual Rights To Pension Benefits,	2
B.	Affected Retirees And Affected Beneficiaries Have Vested Rights To Retirement Benefits Granted In The San Jose Municipal Code Which Have Been Impaired By Measure B.	5
1.	COLAs	9
2.	City's Medical and Dental Plans.....	11
3.	SRBR	13
4.	The Right To Have The City Council Provide Increased Benefits To Retirees And Beneficiaries Without The Approval Of The Voters.	17
C.	Any Right That The City Charter Reserved To The City Council To Modify The Plan Did Not Empower It To Impair Or Otherwise Reduce Vested Benefits Of Individuals Who Already Had Retired Or Their Beneficiaries.	20
D.	Even If City Charter Section 1500 <i>et seq.</i> Was Not Construed To Be Inapplicable To Retirees, It Cannot Be Interpreted To Empower The Impairments Set Forth In Measure B.	23
E.	In Enacting Section 1500 <i>et seq.</i> Of The City Charter, The Voters Expressly Limited The Ability To Amend The Retirement Plan To The City Council.	26
F.	Section 1515-A Of Measure B Violates The Separation Of Powers Doctrine	27
G.	Section 1513-A Of Measure B Violates Article XVI, Section 17 Of The California Constitution.....	28
III.	<u>CONCLUSION</u>	29

TABLE OF AUTHORITIES

Cases

<i>Abbott v. City of Los Angeles</i> (1958) 50 Cal.2d 438 -----	5
<i>Abbott v. San Diego</i> (1958) 165 Cal.App.2d 51 -----	4
<i>Allen v. Board of Administration of the Public Employees Retirement System</i> (1983) 34 Cal.3d 114 -----	5, 27
<i>Allen v. City of Long Beach</i> (1955) 45 Cal.2d 128 -----	3
<i>Arden Carmichael, Inc. v. County of Sacramento</i> (2001) 93 Cal.App.4th 507 -----	24
<i>Bettencourt v. City and County of San Francisco</i> (2007) 146 Cal.App.4th 1090 -----	24
<i>Betts v. Board of Administration</i> (1978) 21 Cal.3d 859 -----	3
<i>Breslin v. City and County of San Francisco</i> (2007) 146 Cal.App.4th 1064 -----	24
<i>Carman v. Alvord</i> (1982) 31 Cal.3d 318 -----	4
<i>De Vita v. County of Napa</i> (1995) 9 Cal.4th 763 -----	30
<i>Frank v. Board of Administration</i> (1976) 56 Cal.App.3d 236 -----	4
<i>Grimm v. City of San Diego</i> (1979) 94 Cal.App.3d 33 -----	19
<i>Kern v. City of Long Beach</i> (1947) 29 Cal.2d 848 -----	3
<i>Kobzoff v. Los Angeles County Harbor/UCLA Medical Center</i> (1998) 19 Cal. 4th 851 -----	23
<i>Legislature v. Eu</i> (1991) 54 Cal.3d 492 -----	27, 28
<i>Mares v. Baughman</i> (2001) 92 Cal.App.4th 672 -----	24
<i>Metromedia, Inc. v. City of San Diego</i> (1982) 32 Cal.3d 180 -----	32

1	<i>Miller v. State of California</i> (1977)	
	18 Cal.3d 808 -----	3
2	<i>Packer v. Bd. of Retirement of the Los Angeles County Peace Officers' Retirement System</i>	
3	(1950) 35 Cal.2d 212 -----	4
4	<i>Peleg v. Neiman Marcus Group, Inc.</i> (2012)	
	204 Cal. App. 4th 1425, -----	26
5	<i>People v. One 1940 Ford V-8 Coupe</i> (1950)	
6	36 Cal.2d 471 -----	24
7	<i>People v. Rizo</i> (2000)	
	22 Cal.4th 681 -----	25
8		
9	<i>Southern California Gas Co. v. City of Santa Ana</i> (9th Cir. 2003)	
10	336 F.3d 885 -----	28
11	<i>Storek and Storek, Inc. v. Citicorp Real Estate, Inc.</i> (2002)	
	100 Cal.App.4th 44 -----	17
12	<i>Teachers' Retirement Bd. v. Genest</i> (2007)	
13	155 Cal.App.4th 1012 -----	8
14	<i>Terry v. City of Berkeley</i> (1953)	
	41 Cal.2d 698 -----	3
15	<i>Third Story Music, Inc. v. Waits</i> (1995)	
16	41 Cal.App.4th 798 -----	17
17	<i>Tobe v. City of Santa Ana</i> (1995)	
	9 Cal.4th 1069 -----	31
18	<i>Valdes v. Cory</i> (1983)	
19	139 Cal.App.3d 773 -----	9, 19
20	<i>Wallace v. City of Fresno</i> (1953)	
21	42 Cal.2d 180 -----	3
22	<i>Walnut Creek Manor v. Fair Employment & Housing Com.</i> (1991)	
	54 Cal. 3d 245 -----	31
23	<i>White v. Ultramar, Inc.</i> (1999)	
24	21 Cal.4th 563 -----	23
25	<i>Wilson v. Board of Administration</i> (1997)	
26	52 Cal.App.4th 1109 -----	9, 10, 11
	<u>Statutes</u>	
27	Probate Code Section 16080 -----	15
28	Probate Code Section 16081 -----	15
	Probate Code Section 16082 -----	16

Other Authorities

Ordinance No. 15118) -----	17
Ordinance No. 21763 -----	18
Ordinance No. 22261 -----	18

“The Sustainable Retirement Benefits and Compensation Act” (“Measure B”) -----	1
Section 1502-A, -----	22
Section 1504-A -----	2, 6, 19, 29
Section 1510-A -----	5, 10, 13, 27, 29
Section 1511-A -----	6, 16
Section 1512-A -----	12
Section 1513-A -----	28
Section 1515-A -----	27, 29, i
Section 1515-A(b)-----	27

San Jose City Charter

Section 78(b) -----	27
Section 1500 -----	5, 22
Section 1503 -----	20

San Jose Municipal Code

Chapter 3.24 -----	5, 10, 11, 18
Section 3.24.2270 -----	11
Section 3.24.2320 -----	12
Chapter 3.28 -----	5, 10, 11
Section 3.28.1950 -----	17
Section 3.28.1970 -----	11, 17
Section 3.28.200 -----	5, 13, 14
Section 3.28.2020 -----	12

Chapter 3.44 -----	9
--------------------	---

Constitutional Provisions

United States Constitution

Article I, Section 10, Clause 1 -----	2
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California Constitution

Article I, Section 9 -----	1
Article III, Section 3 -----	1, 27, 29
Article XVI, Section 17 -----	1, 15, 28, 29, i
Article XVI, Section 17(b)-----	28

1 **I. INTRODUCTION**

2 Plaintiff/Petitioner, the San Jose Retired Employees Association ("SJREA"), seeks
3 injunctive, declaratory and writ relief on behalf of affected retirees ("Affected Retirees") of the
4 Federated Employees Retirement Plan ("the Plan"), as well as qualifying spouses, domestic
5 partners and other eligible beneficiaries of Affected Retirees and eligible beneficiaries of
6 deceased employees ("Affected Beneficiaries"). SJREA contends that certain provisions of
7 "The Sustainable Retirement Benefits and Compensation Act" ("Measure B") passed by the
8 voters of the City of San Jose (the "City") on June 5, 2012 impair vested contractual rights of
9 Affected Retirees and Affected Beneficiaries, in violation of the "Contract Clause" of the
10 California Constitution (Article I, Section 9). SJREA also asserts that Measure B constitutes a
11 violation of the Separation of Powers provision contained in Article III, Section 3 of the
12 California Constitution and a violation of the California Pension Protection Act, which appears
13 in Article XVI, Section 17 of the California Constitution.
14

15 In particular, SJREA claims that Section 1510-A of Measure B impaired vested rights
16 of Affected Retirees and Affected Beneficiaries to a specified annual Cost Of Living
17 Adjustment ("COLA") as set forth in the City's Municipal Code by converting this
18 unconditional entitlement into one that is subject to reduction by temporary elimination in the
19 event the City Council declares a fiscal and service level emergency. Likewise, SJREA asserts
20 that Section 1512-A of Measure B impaired vested rights of Affected Retirees and Affected
21 Beneficiaries to participate in the City's medical and dental insurance plans and to receive a
22 specified payment that would cover all or a portion of the monthly premiums by promulgating
23 that these entitlements are no longer vested rights but, instead, are subject to the City's "power
24 to amend, change or terminate [those benefits]."

25 Further, the uncontradicted evidence will demonstrate that the City's Municipal Code
26 (a) established a Supplemental Retiree Benefit Reserve ("SRBR") and (b) mandates that, under
27 certain specified circumstances, funds be allocated to the SRBR from which the City Council is
28 to exercise its discretion to provide supplemental benefits to retirees. Section 1511-A of

1 Measure B discontinued the SRBR and the City has transferred all of the funds contained
2 therein to the General Retirement Trust Fund, thereby impairing the vested entitlements of
3 Affected Retirees and Affected Beneficiaries to have these funds set aside under appropriate
4 circumstances and to have the City Council exercise its discretion from time to time as to
5 whether distributions should be made to them. In that same vein, the evidence also will
6 establish that Section 1504-A of Measure B impaired the existing entitlement of Affected
7 Retirees and Affected Beneficiaries to have the City Council exercise its discretion, without
8 any requirement of voter approval, to provide additional benefits over and above those
9 specifically granted under the Plan by limiting the ability of the City Council to provide those
10 enhancements only to those situations where there has been voter approval.

11 **II. ARGUMENT**

12 **A. A Long Line Of California Authorities Clearly And Unequivocally Establish That** 13 **Public Employees Have Vested Contractual Rights To Pension Benefits.**

14 Article I, Section 9 of the California Constitution¹ states:

15 A bill of attainder, ex post facto law, or law impairing the obligation of
16 contracts may not be passed. (Emphasis added.)

17 For many decades, reported decisions of the California Supreme Court and its Courts of
18 Appeal from all appellate districts have repeatedly and consistently held that, as soon as an
19 individual commences rendering service for a public agency, he/she has earned as a part of the
20 consideration in return for performing those services deferred compensation in the form of a
21 vested contractual right to the retirement benefits that then exist for similarly situated
22 employees (*i.e.*, those which would be provided if he/she qualified for retirement at that time).
23 See, *e.g.*, *Kern v. City of Long Beach* (1947) 29 Cal.2d 848. “. . . [W]here services are rendered
24 under a pension statute, the pension provisions become a part of the contemplated
25 compensation for those services and so in a sense a part of the contract of employment itself.”
26

27 ¹ Article I, Section 9 of the California Constitution mirrors Article I, Section 10, Clause 1, (the “Contract Clause”) of the United States Constitution. However, SJREA is not attacking Measure B on the grounds that it violates the
28 Federal Constitution.

1 *Id.* at 851-852. In other words, pension benefits are a form of deferred compensation. *Wallace*
2 *v. City of Fresno* (1953) 42 Cal.2d 180, 184-185. That deferred compensation matures into an
3 unconditional entitlement when the individual satisfies the conditions precedent to qualifying
4 for retirement benefits.

5 Under California law, there is a strong preference for construing governmental pension
6 laws as creating contractual rights for the payment of benefits. See *Allen v. City of Long Beach*
7 (1955) 45 Cal.2d 128; *Terry v. City of Berkeley* (1953) 41 Cal.2d 698. Where it is feasible to
8 do so the enactment of a governmental pension plan should be construed as guaranteeing full
9 payment to those entitled to its benefits with the provision of adequate funds for that purpose.
10 *Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351; see also *Carman v. Alvord* (1982) 31
11 Cal.3d 318, 332.

12 The right to pension benefits vests upon acceptance of employment. *Betts v. Board of*
13 *Administration* (1978) 21 Cal.3d 859, 863; *Miller v. State of California* (1977) 18 Cal.3d 808,
14 815-816; and *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 852. As an integral part of the
15 agreed-upon compensation, a pension right, once vested (even though not yet matured), may
16 not be destroyed by a public employer without impairing a contractual obligation, in violation
17 of Article I, Section 9 of the California Constitution. *Carman v. Alvord* (1982) 31 Cal.3d 318,
18 325; *Betts v. Board of Administration, supra*, 21 Cal.3d 859, 863; and *Frank v. Board of*
19 *Administration* (1976) 56 Cal.App.3d 236, 242.

20 Further, where additional or improved retirement benefits are provided during
21 employment, the employee earns a vested right to those enhanced benefits. *Betts v. Board of*
22 *Administration, supra*, 21 Cal.3d 859, 867; *Abbott v. San Diego* (1958) 165 Cal.App.2d 51,
23 518. Additionally, benefits to a survivor of a public employee are an element of the
24 compensation owed to the public employee and thus may not be impaired. *Packer v. Bd. of*
25 *Retirement of the Los Angeles County Peace Officers' Retirement System* (1950) 35 Cal.2d 212,
26 215.

27 While vested pension rights may be modified **prior to retirement**, those modifications
28 must be reasonable and "changes in a pension plan which would result in disadvantage to

1 **employees** should be accompanied by comparable new advantages.” (Emphasis added.) *Allen*
2 *v. City of Long Beach, supra*, 45 Cal.2d at 131; see also *Abbott v. City of Los Angeles* (1958) 50
3 Cal.2d 438, 488-89. Thus, even permissible amendments which must be accompanied by
4 comparable new advantages only can occur with respect to **employees, not retirees**.

5 This concept was clearly recognized in *Allen v. Board of Administration of the Public*
6 *Employees Retirement System* (1983) 34 Cal.3d 114, 120, when, after quoting the above
7 language from *Allen v. City of Long Beach* and *Abbott v. City of Los Angeles*, the Supreme
8 Court observed:

9 As to retired employees, the scope of continuing governmental power may **be**
10 **more restricted, the retiree being entitled to the fulfillment of the contract**
11 **which he already has performed without detrimental modification.**
[Citation.] (Emphasis added.)

12 Therefore, **once an individual has retired**, the former employer cannot make any
13 modifications to the pension plan that would result in a disadvantage to that individual. This
14 proposition previously had been solidified by the California Supreme Court in *Terry v. City of*
15 *Berkeley, supra*, 21 Cal.2d 698, 702-03. That opinion emphasized that any changes that are
16 permissible before retirement cannot occur once an individual has actually retired, where the
17 employee had “rendered the called-for performance; . . . had done everything possible to entitle
18 him to the payment of the pension and all conditions precedent to the obligation of the city
19 were fulfilled upon the determination that he be retired as a result of the service-connected
20 disability.” Thus, it would be a clear impairment of a vested right even to attempt to make that
21 trade after retirement has occurred.

22 Finally, the evidence will establish that the Employee Handbooks furnished to City
23 employees that describe their terms and conditions of employment illustrate clearly the City’s
24 recognition of the state of the law regarding the vesting of retirement benefits in existence at
25 the time employees rendered service. For example, in the 1990 Plan Handbook, in Chapter 4 –
26 “Vesting,” it states:

27 “Vesting” is the term used to describe a right which is yours once you have
28 reached or attained this status. Some systems measure this condition by length

1 of service or by your retirement contributions. If you were an employee of the
2 City on or before June 30, 1975, you became a member of the retirement system
3 when your contributions, including those contributions to the cost-of-living
4 fund, had reached \$500. When this happened, you became a “full-fledged”
5 member with valuable *vested* rights, one of which allowed you to leave City
6 employment and later to return without loss of length of service credits to a
7 future retirement, provided you allowed your accumulated contributions to
8 remain on deposit. This vested right is continued to those members who became
9 members prior to July 1, 1975, but not granted to those becoming members later.
10 (*Italics in original.*)

11 What the Handbook explained is that employees who became members prior to July 1,
12 1975 acquired a **vested right** “to leave City Employment and later to return without loss of
13 length of service credits to a future retirement, provided [they] allowed [their] accumulated
14 contributions to remain on deposit.” Most significantly, the Handbook also recognizes that,
15 because this benefit was not provided to individuals who became members after July 1, 1975,
16 those persons did not acquire that vested right, thereby communicating that City employees
17 earn vested contracted rights to those pension benefits **in existence during their employment.**

18 **B. Affected Retirees And Affected Beneficiaries Have Vested Rights To**
19 **Retirement Benefits Granted In The San Jose Municipal Code Which Have**
20 **Been Impaired By Measure B.**

21 Article XV, Section 1500 of the City Charter requires the City Council to establish and
22 maintain a retirement plan for all officers and employees of the City, which the City Council
23 has done. Among the benefits to which the Affected Retirees and Affected Beneficiaries
24 earned vested rights during employment pursuant to the San Jose Municipal Code (“SJMC”) are:
25 (1) COLAs (Chapter 3.44); (2) entitlement to medical and dental insurance coverage and
26 premium subsidies (Chapter 3.24, Parts 23 and 24, and Chapter 3.28, Parts 16 and 17); (3) the
27 right to fund, and receive discretionary distributions from, the SRBR (Sections 3.28.200 *et seq.*
28 and particularly Section 3.28.340); and (4) the right to have the City Council provide additional
or improved benefits to retirees without voter approval.

The passage of Measure B impairs those vested rights as follows:

- Section 1510-A of Measure B, entitled “Emergency Measures to Contain

1 Retiree Cost of Living Adjustments,” imposes a contingency whereby the City
2 can suspend COLAs for up to five years solely by declaring a fiscal and service
3 level emergency, where no such contingency previously existed.

- 4 • Section 1511-A of Measure B, entitled “Supplemental Payments to Retirees,”
5 discontinues the SRBR, transfers its funds to the general Retirement Fund so as
6 to reduce the City’s future funding obligations and provides no authorization for
7 similar supplemental payments to be made to retirees.
- 8 • Section 1512-A of Measure B, entitled “Retiree Healthcare,” impairs retirees’
9 rights to medical and dental insurance coverage and premium subsidies from the
10 City’s medical and dental plans by re-characterizing those already earned vested
11 contractual rights as non-vested rights.
- 12 • Section 1504-A of Measure B, entitled “Reservation of Voter Authority,” adds
13 an additional requirement that did not previously exist with respect to the
14 entitlement to discretionary additional or improved benefits from the City
15 Council by requiring voter approval prior to any such exercise of discretion.

16 As we previously demonstrated, Article I, Section 9 of the California Constitution
17 forbids the passage of laws **impairing** the obligation of contracts. Therefore, an analysis as to
18 whether an impairment has occurred must begin with the definition of the word “impair.” “In
19 construing [an enactment], we begin by examining ... language, giving the words their usual
20 and ordinary meaning, because words of [an enactment] ordinarily provide the most reliable
21 indication of ...intent.” *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th
22 1143, 1152.

23 Black’s Law Dictionary, Abridged 8th Edition, defines impair as: “To diminish the
24 value of property or a property right. This term is commonly used in reference to diminishing
25 the value of a contractual obligation to the point that the contract becomes invalid or a party
26 loses the benefit of the contract.” In contrast, it defines abrogate, which term does **not** appear
27 in Article I, Section 9, as “To abolish (a law or custom) by formal or authoritative action; to
28 annul or repeal.” The two words are related, but are differentiated by degree. **To impair is to**

1 **lessen**, while to abrogate is to destroy.

2 It must be emphasized that, in order to find that vested rights have been impaired, no
3 showing is required that the Affected Retirees and Affected Beneficiaries have **presently**
4 suffered monetary loss. Subjecting vested rights to **an increased risk of detriment** is
5 sufficient to impair the vested contractual rights of the Affected Retirees and Affected
6 Beneficiaries.

7 In *Teachers' Retirement Bd. v. Genest* (2007) 155 Cal.App.4th 1012 ("*TRB*"), the
8 Teachers' Retirement Board challenged a bill that sought to reduce the State's obligation to
9 fund the Supplemental Benefit Maintenance Account of the Teachers' Retirement Fund
10 ("*SBMA*") by \$500 million. By an earlier statute, the Legislature had granted retirement
11 association members a vested right to have the State make an appropriation equal to 2.5 percent
12 of the total of the creditable compensation of the immediately preceding calendar year upon
13 which members' contributions are based for purposes of funding the SBMA. *Id.* at 1022. The
14 challenged bill provided for an actuarial evaluation to be made every four years of the
15 anticipated liability of the SBMA. If the evaluation disclosed that the funds in the SBMA
16 would be insufficient, then money would be appropriated from the General Fund to cover the
17 shortfall. *Id.* at 1023.

18 The Court summarized that what the Legislature had done was to replace a \$500 million
19 obligation with a contingent obligation to transfer the sum to the SBMA over a 33 year period,
20 conditioned upon a determination by an actuary establishing that this sum or any portion
21 thereof is needed to meet the purchasing power protection benefit obligations in any year
22 between 2006 and 2036. If any actuary were to determine that the SBMA was able to provide
23 80 percent purchasing power protection until July 2036, (and the operative period was not
24 extended) then the \$500 million the Legislature deducted from its obligation to fund the SBMA
25 would never be reimbursed. *Id.* at 1024.

26 The Court determined that reducing the income stream available to pay the
27 supplemental benefits by \$500 million **increased the risk** to members that SBMA funds would
28 be insufficient to make the supplemental benefit payments in the future. Consequently, it held

1 that, because the challenged bill did not provide some comparable new advantage, it
2 substantially impaired contractual rights in violation of the State and Federal Constitutions. *Id.*
3 at 1039.

4 Likewise, the conduct of an employer in delaying the payment of its required retirement
5 contributions or refraining from making them altogether **impairs the vested rights** of affected
6 individuals to a **fiscally sound retirement system**. See *Wilson v. Board of Administration*
7 (1997) 52 Cal.App.4th 1109 and *Valdes v. Cory* (1983) 139 Cal.App.3d 773.

8 In *Valdes*, the Court invalidated as unconstitutional certain 1982 legislative
9 amendments affecting the method of funding by the Public Employees' Retirement System
10 ("PERS") under the Public Employees' Retirement Law ("PERL"). One provision prohibited
11 payment of previously appropriated state-employer contributions from the state General Fund
12 to the PERS fund for three months and reverted those monies to the unappropriated surplus of
13 the General Fund. *Id.* at 778. Another provision ceased school-employer contributions for the
14 same months and provided a mechanism for their reversion to the unappropriated surplus of the
15 General Fund. *Ibid.* The legislation also required the PERS Board to transfer an amount equal
16 to that which would otherwise be paid by state and school employers as their three-month
17 contributions to PERS from the "reserve against deficiencies" portion of the PERS fund to its
18 unallocated portion. *Ibid.* The legislation further mandated a retroactive reduction of
19 previously appropriated employer contributions by some school employers for the previous
20 fiscal year and directed the PERS Board to make commensurate adjustments or refunds from its
21 reserve against deficiencies. *Id.* at 778-79.

22 The Opinion noted that the employees suffered no out-of-pocket losses from the
23 suspension of employer contributions because PERS benefits are defined by statutory formula
24 at the time of employment. *Id.* at 785. Nevertheless, the Court emphasized (*ibid.*) that
25 "Authority is not lacking, however, for the proposition that employee pension beneficiaries
26 have a vested interest in the integrity and security of the source of funding for the payment of
27 benefits. (Citations.)"

1 Accordingly, the Court decided that the state employers were contractually bound in a
2 constitutional sense to pay the withheld appropriations to the PERS fund, since explicit
3 language in the retirement law constituted a contractual obligation on the part of the state as
4 employer to abide by its continuing obligation to make the statutorily set payment of monthly
5 contributions. *Id.* at 787, 783-789. The Opinion further stated (at 786):

6 When instead the Legislature directs that funds held in trust for the exclusive
7 benefit of the members and beneficiaries of PERS be used to satisfy the state's
8 contractual obligations to make monthly contributions to the retirement fund so
9 that monies regularly appropriated for that purpose can irretrievably be
10 redirected to balance the state budget, the effect is that...vested rights of PERS
11 members are impaired.

12 The Court (at pp. 789-90) concluded "... that the Legislature's rescission of existing
13 appropriations for employer contributions, theoretically representing the 'employer's ongoing
14 share of the actuarial equivalent of amounts necessary to fund current and future benefits due
15 covered employees' (citation omitted), **substantially impairs public employees' assurance
16 that they will ultimately receive the retirement benefits to which they become entitled**
17 (citation omitted)." (Emphasis added.)

18 Likewise, in *Wilson v. Board of Administration, supra*, 52 Cal.App.4th 1109, 1118, the
19 Court struck down as an impairment of employees' vested rights an enactment which
20 threatened employees' assurance of receiving earned benefits after retirement. *Wilson* involved
21 an enactment calling for "in arrears" pension financing, as distinguished from a "level
22 contribution" system. Under the "level contribution" system, payments flowed to the
23 retirement fund as liability was incurred for future pension obligations. Under the "in arrears"
24 system, contributions would not be paid during the same fiscal year that employee services
25 were rendered. *Id.* at 1121-1122.

26 1. COLAs

27 On or about April 1, 1970, the City Council adopted SJMC Chapter 3.44 to provide
28 COLAs for retirement allowances and survivorship allowances based upon percentage changes
in the applicable Consumer Price Index. The Affected Retirees who were employed on or after

1 that date, their Affected Beneficiaries, and those persons who became Affected Beneficiaries
2 on or after such enactment who met the eligibility requirements set forth in Chapter 3.44 earned
3 a vested contractual right to the COLAs described in Chapter 3.44. Section 3.44.030 of the
4 current SJMC states in pertinent part at paragraph (a)(1):

5 Each retirement allowance and each survivorship allowance which is payable
6 under Chapter 3.24 or Chapter 3.28 in any subject year which begins on or after
7 April 1, 2006, together with any increases or decreases in the amount of any
8 such allowance which were previously made pursuant to this Chapter 3.44, shall
9 be increased by three percent per annum in lieu of the increase otherwise
 provided in this chapter. The first such three percent increase shall be made on
 April 1, 2006.

10 Prior to 2006, it provided for an annual COLA based upon the percentage increase in
11 the applicable Consumer Price Index published by the United States Department of Labor with
12 a "cap" of three percent.

13 Throughout this time, employees funded a portion of this benefit by paying
14 contributions that, in part, were designed to fund an annual three percent COLA.

15 Section 1510-A of Measure B impairs the vested rights of Affected Retirees and
16 Affected Beneficiaries to receive COLAs because it adds a contingency whereby the City can
17 suspend COLAs upon its declaration of a fiscal and service level emergency, where no such
18 contingency previously existed. Section 1510-A states:

19 If the City Council adopts a resolution declaring a fiscal and service level
20 emergency, with a finding that it is necessary to suspend increases in cost of
21 living payments to retirees the City may adopt the following emergency
22 measures, applicable to retirees (current and future retirees employed as of the
 effective date of this Act):

23 (a) Cost of living adjustments ("COLAs") shall be temporarily suspended
24 for all retirees in whole or in part for up to five years. The City Council shall
25 restore COLAs prospectively (in whole or in part), if it determines that the fiscal
26 emergency has eased sufficiently to permit the City to provide essential services
 protecting the health and well-being of City residents while paying the cost of
 such COLAs.

27 By adding a contingency whereby the City Council can now suspend the three percent
28 COLA for up to five years simply by declaring a fiscal emergency, Section 1501-A has

1 weakened and diminished the value of the vested rights of Affected Retirees and Affected
2 Beneficiaries. Just as in *TRB*, *Valdes* and *Wilson*, the Affected Retirees and Affected
3 Beneficiaries need not wait to see whether the City ever declares a fiscal emergency before an
4 impairment takes place, any more than the plaintiffs in those cases needed to wait for a
5 reduction of benefits before a substantial impairment could be asserted.

6 7 **2. City's Medical and Dental Plans**

8 Pursuant to SJMC Chapter 3.24, Part 23 and Chapter 3.28, Part 16, which became
9 effective on or about September 18, 1984, Affected Retirees who were employed on or after
10 that date, their Affected Beneficiaries, and those persons who became Affected Beneficiaries
11 on or after such enactment, became eligible to participate in the City's medical plan with
12 respect to which the plan pays all or a prescribed portion of the premium upon and following
13 their retirement or, in the case of a survivor, following the death of the member.

14 Section 3.28.1970 of the SJMC states in pertinent part:

15 A. A member, as specified in Section 3.28.1950, above, is eligible to
16 participate in a medical insurance plan sponsored by the city provided that the
member satisfies the following requirements:

17 1. The member retires for service or disability pursuant to the
provisions of this chapter; and

18 2. The member applies for medical insurance coverage at the time of
19 his or her retirement in accordance with the provisions of the medical insurance
plan, and agrees to pay any applicable premiums².

20 Thus, those Affected Retirees who were employed on or after the enactment of the
21 City's medical plan, their Affected Beneficiaries and those persons who became Affected
22 Beneficiaries on or after such enactment who met the minimum requirements set forth in the
23 Plan earned a vested contractual right to participate in the City's medical plan following the
24 Affected Retirees' retirement or, in the case of a survivor, following the death of the member.

25 Pursuant to SJMC Chapter 3.24, Part 24 and SJMC Chapter 3.28, Part 17, which
26 became effective on or about June 3, 1986, Affected Retirees who were employed on or after
27

28 ² As we will later discuss (*infra*, at p. 18), an analogous provision for Federated employees who retired prior to
1975 was then set forth in Section 3.24.2270 of the SJMC.

1 that date, their Affected Beneficiaries, and those persons who became Affected Beneficiaries
2 on or after that date who met the requirements set forth therein, became eligible to participate
3 in the City's dental plan with respect to which the plan pays all of the premium upon and
4 following their retirement or, in the case of a survivor, following the death of the member.

5 Section 3.28.2020 states in pertinent part:

6 A. A member, as specified in Section 3.28.2000 above, is eligible to
7 participate in a dental insurance plan sponsored by the city provided that the
8 member satisfies the following requirements:

9 1. The member terminates city employment pursuant to the retirement
10 provisions of this chapter; and

11 2. At the time of his or her retirement, the member is enrolled in one of
12 the dental insurance plans sponsored by the city³.

13 Thus, those Affected Retirees who were employed on or after the enactment of the
14 City's dental plan, their Affected Beneficiaries, and those persons who became Affected
15 Beneficiaries on or after such enactment who met the minimum requirements set forth in the
16 plan, earned a vested contractual right to participate in the City's dental plan following the
17 Affected Retirees' retirement or, in the case of a survivor, following the death of the member.

18 Section 1512-A impairs the vested rights of Affected Retirees and Affected
19 Beneficiaries to health and dental insurance coverage and premium subsidies by converting
20 what were vested contractual rights into non-vested rights. In that regard, Section 1512-A of
21 Measure B states in pertinent part:

22 (b) Reservation of Rights. No retiree healthcare plan or benefit shall grant
23 any vested right, as the City retains its power to amend, change or terminate any
24 plan provision."

25 On its face, Section 1512-A, paragraph (b) of Measure B impairs the vested rights of
26 Affected Retirees and Affected Beneficiaries by turning them into non-vested rights.⁴ Just as

27 ³ As we will later discuss (*infra* at p. 18), an analogous provision for Federated employees who retired prior to
1975 was then set forth in Section 3.24.2320 of the SJMC.

28 ⁴ The fact that this conversion was deemed necessary is perhaps the strongest evidence that these retiree medical
and dental benefits already earned are regarded by the City as, and are, vested rights.

1 with Section 1510-A, which impairs Affected Retirees' and Affected Beneficiaries' right to
2 COLAs, the alteration of the right to health care and dental coverage and premium
3 contributions from vested to non-vested rights increases the risk that such rights will be reduced
4 or abrogated and, thus, is in itself an impairment.

5 6 3. SRBR

7 On or about June 3, 1986, the City Council enacted SJMC Sections 3.28.200, *et seq.*
8 and particularly Section 3.28.340, which established the SRBR within the San Jose Federated
9 Employees City Retirement Fund (the "Fund").

10 The purpose of the SRBR was to provide additional payments or other benefits to
11 retired members, survivors of members, and survivors of retired members. SJMC Section
12 3.28.340(E)(1). As evidenced by the frequent occurrence of the word "shall" throughout SJMC
13 Section 3.28.340, that section contains mandatory language requiring the funding of the SRBR.
14 Further, it contains mandatory language for the exercise of discretion by the City Council as to
15 whether to make a distribution from the SRBR upon a recommendation from the Board. In that
16 regard, SJMC Section 3.28.340(A)(2) states:

17 a. The board **shall** credit to the supplemental retire (sic) benefit reserve all
18 interest payable pursuant to subsection C. below and that portion of the excess
earnings determined pursuant to subsection D. below.

19 b. Distributions from the supplemental retiree benefit reserve **shall** be made in
20 accordance with subsection E. below. (Emphasis added.)

21 SJMC Section 3.28.340(C)(2) reads in pertinent part:

22 Interest **shall** be credited to the supplemental retiree benefit reserve at the
23 actuarially assumed annual rate adopted by the board pursuant to Section
24 3.28.200 or at the actual rate of return earned by the retirement fund during the
applicable fiscal year, whichever is lower. Interest credited to the supplemental
25 retiree benefit reserve **shall** be calculated as though the transfer of excess
earnings required by subsection D. had been made on July 1 of the calendar
year, regardless of the actual date such transfer is made. (Emphasis added.)

26 SJMC Section 3.28.340(D)(2) provides in pertinent part:

27 If the balance remaining in the income account is greater than zero, the board
28 **shall** by written resolution declare that balance to be the excess earnings for the
applicable fiscal year, **shall** transfer ten percent of the excess earnings to the

1 supplemental retiree benefit reserve, and shall transfer the remaining ninety
2 percent of the excess earnings to the general reserve. (Emphasis added.)

3 SJMC Section 3.28.340(E)(2) provides in pertinent part:

4 Upon request of the city council or on its own motion, the board **may** make
5 recommendations to the city council regarding the distribution, **if any**, of the
6 supplemental retiree benefit reserve to retired members, survivors of members,
7 and survivors or retired members. The city council, after consideration of the
8 recommendation of the board, **shall determine** the distribution, **if any**, of the
9 supplemental retiree benefit reserve to said persons. (Emphasis added.)

10 Like the COLA, employee contributions were calculated to fund their portion of the
11 SRBR. Therefore, those Affected Retirees who were employed on or after the establishment of
12 the SRBR and those persons who became beneficiaries on or after such establishment who met
13 the eligibility requirements set forth in SJMC Section 3.28.200, et seq. earned vested rights to
14 (a) the funding and maintenance of the SRBR pursuant to the terms set forth in SJMC Section
15 3.28.340 as well as (b) the exercise of discretion by the City Council as to when to provide
16 distributions from the SRBR.

17 The City has previously argued that, because the City Council retained discretion as to
18 **when** to make distributions, Affected Retirees and Affected Beneficiaries could not have
19 acquired a vested right to the funding and discretionary distributions from the SRBR. The
20 City's arguments were incorrect as they required the Court to overlook the mandatory language
21 occurring throughout SJMC Section 3.28.340.

22 Based upon the mandatory language appearing above, the City has absolutely no
23 discretion with respect to the establishment and funding of the SRBR. Further, pursuant to
24 SJMC Section 3.28.340(A)(2)(b), the City Council must exercise its discretion from time to
25 time as to whether it would then be appropriate to distribute those **earmarked** funds.
26 Consequently, the only discretion the City maintains is **when** to provide distributions from the
27 SRBR.

28 The term "if any" in the SJMC Section 3.28.340(E)(2) shows that, following any given
motion or recommendation made by the Board or the City Council, the City Council is not
required to authorize a distribution. However, as evidenced by the presence of the word "shall"
in SJMC Section 3.28.240(E)(2), upon any such motion or recommendation, retired members

1 and their survivors are **entitled to a determination** by the City Council as to whether it will
2 authorize the particular recommended distribution at that time. This conclusion is supported by
3 the fact that, in contrast to SJMC Section 3.28.240(E)(2), the phrase “if any” does not appear in
4 SJMC Section 3.28.340(A)(2)(b).

5 Just because the City Council has “discretion to ‘determine the distribution,’ it does not
6 mean that a contractual obligation does not arise. Under California law, an obligation under a
7 contract is not illusory if the obligated party’s discretion must be exercised with reasonableness
8 or good faith. *Storek and Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44,
9 61; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806 (‘the implied covenant of
10 good faith is also applied to contradict an express contractual grant of discretion when
11 necessary to protect an agreement which otherwise would be rendered illusory and
12 unenforceable’).”

13 California Constitution, Article XVI, Section 17 provides in pertinent part:

- 14 (a) . . . **The assets of a public pension or retirement system are trust funds**
15 and shall be held for the exclusive purposes of providing benefits to
16 participants in the pension or retirement system and their beneficiaries and
17 defraying reasonable expenses of administering the system. (Emphasis
18 added.)

18 Thus, the SRBR is a separate trust whose beneficiaries are retired members and their
19 survivors. Under the terms of the Plan, the governing body of the City, its City Council, is the
20 trustee, charged with making distributions from the trust to the retired members and their
21 survivors at times within their discretion. Therefore, it is instructive to analyze Measure B’s
22 impact on the SRBR using the law of trusts.

23 California Probate Code Section 16080 provides: “Except as provided in Section
24 16081, a discretionary power conferred upon a trustee is not left to the trustee’s arbitrary
25 discretion, but shall be exercised reasonably.” California Probate Code Section 16081 states:

- 26 (a) Subject to the additional requirements of subdivisions (b), (c), and (d), if a
27 trust instrument confers “absolute,” “sole,” or “uncontrolled” discretion on a
28 trustee, the trustee shall act in accordance with fiduciary principles and shall not
act in bad faith or in disregard of the purposes of the trust.

1 (b) Notwithstanding the use of terms like “absolute,” “sole,” or “uncontrolled”
2 by a settlor or a testator, a person who is a beneficiary of a trust that permits the
3 person, either individually or as trustee or cotrustee, to make discretionary
distributions of income or principal to or for the benefit of himself or herself
pursuant to a standard, shall exercise that power reasonably and in accordance
with the standard.

4 Most importantly, California Probate Code Section 16082 states: “Except as otherwise
5 specifically provided in the trust instrument, a person who holds a power to appoint or
6 distribute income or principal to or for the benefit of others, either as an individual or as a
7 trustee, may not use the power to discharge the legal obligations of the person holding the
8 power.”

9 Section 1511-A of Measure B states:

10 The Supplemental Retiree Benefit Reserve (“SRBR”) **shall be discontinued,**
11 and the **assets returned to the appropriate retirement trust fund.** Any
12 supplemental payments to retirees in addition to the benefits authorized herein
shall not be funded from plan assets. (Emphasis added.)

13 The passage of Section 1511-A of Measure B, which abolishes the SRBR, impairs the
14 vested rights of the Affected Retirees and Affected Beneficiaries to the funding of and
15 discretionary distributions from the SRBR. Measure B abolishes the trust and allows the City
16 to convert the funds for its own purposes. Certainly, no trustee could justify such conduct. The
17 City Council, as trustee for the SRBR funds, cannot lawfully do what no other trustee in the
18 state of California could do, *i.e.*, abolish a trust and convert the funds of that trust for its own
19 use.

20 Furthermore, the failure to contribute funds pursuant to a mandatory prescribed formula
21 has been found to be an impairment of a vested right. *TRB, supra*, 155 Cal.App.4th at 1022.
22 and *Valdes v. Cory, supra*. Likewise, in our case, Section 3.28.340(A)(2)(a) of the SJMC
23 similarly requires the City to contribute funds to the SRBR pursuant to a mandatory prescribed
24 formula as set forth in paragraphs C and D. Here too, funds are being shifted from a specific
25 fund that was to be used only to make supplemental benefits to retirees and their beneficiaries.
26 As Measure B abolishes the SRBR, it necessarily precludes funds from being contributed to the
27 SRBR. Further, Measure B makes it a certainty that the funds which **were** to be used solely for
28 retirees and their beneficiaries will not be, and in so doing has impaired retirees’ vested rights.

1 As in *Valdes*, those funds are now **improperly** being used to enable the employer to reduce the
2 amount of retirement contributions it is required to make.

3 Consequently, Measure B impairs the rights of Affected Retirees and Affected
4 Beneficiaries to have the SRBR funded and maintained by the City and to have the City
5 Council periodically exercise its discretion in good faith as to whether and to what extent those
6 funds should be distributed to retirees and eligible beneficiaries on that particular occasion.

7
8 **4. The Right To Have The City Council Provide Increased Benefits To**
9 **Retirees And Beneficiaries Without The Approval Of The Voters.**

10 A city council's decision regarding a pension system that does not impair vested rights
11 must be upheld unless expressly prohibited by the city charter. *Grimm v. City of San Diego*
12 (1979) 94 Cal.App.3d 33, 38. Thus, the City Council, as the City's governing body, possessed
13 the inherent authority to provide additional pension benefits to Affected Retirees and Affected
14 Beneficiaries after retirement. In fact, the City's own enactments conclusively establish that
15 the City Council has historically provided retirees and beneficiaries of deceased retirees with
16 additional or improved benefits when it has done so for active employees.

17 For example, in 1970, when the COLA began, the implementing Ordinance (15118)
18 specifically called for percentage increases in monthly allowances for individuals who had
19 retired as far back as 1939. Ordinance 15118, Section 2904.400.

20 With regard to medical insurance, Section 3.28.1950 describes the universe of persons
21 eligible to receive medical insurance coverage and subsidies under the City's plan. It states in
22 pertinent part:

23 Subject to the provisions of this chapter, a **member** may be entitled to
24 medical insurance coverage in an eligible medical plan as specified in
25 Section 3.28.1970 if the member satisfies the requirements of Subsection
A., Subsection B., or Subsection C.

26 A. The **member** is retired for service or disability under the
27 provisions of this chapter and at the time of such retirement meets any of
28 the following requirements:

1 1. Is entitled to credit for fifteen or more years of service.
2 (Emphasis added.)

3 The use of the broad descriptive word, "member," clearly demonstrates an intent to
4 include both active and retired members. Had the drafters of that provision intended to confine
5 its application only to active employees when they retire (and their beneficiaries), they would
6 have mirrored the approach taken in Section 1500 *et seq.* of the City Charter by using the words
7 "officers or employees" or a similar description. Again, the fact that the all-encompassing
8 term, "member," was utilized conclusively communicates an intent for the retiree medical
9 insurance benefit to be made available to individuals who had already retired.

10 Furthermore, with respect to participation in the City's medical plan, Ordinance No.
11 21763, adopted in 1984, granted retired members of the 1951-1975 version of Plan (SJMC
12 Chapter 3.24, specifically Part 23) entitlement to medical coverage after retirement. As a
13 result, retired members who had retired well before the enactment of Ordinance No. 21763
14 received retiree medical coverage through the City's medical plan. Similarly, Ordinance No.
15 22261, adopted in 1986, granted retired members of the 1951-1975 version of the plan (SJMC
16 Chapter 3.24, specifically Part 24) entitlement to post-retirement medical coverage. As a
17 result, members who had retired well before the enactment of Ordinance No. 22261 received
18 dental coverage through the City's dental plan.

19 As we previously illustrated (*ante* p. 14), as to the SRBR, SJMC Section 3.28.340(E)(2)
20 provides in pertinent part:

21 Upon request of the city council or on its own motion, the board may make
22 recommendations to the city council regarding the distribution, if any, of the
23 supplemental retiree benefit reserve to **retired members, survivors of**
24 **members, and survivors or retired members.** The city council, after
25 consideration of the recommendation of the board, shall determine the
26 distribution, if any, of the supplemental retiree benefit reserve to said persons.

27 There is no limitation anywhere in the SJMC that those retired members must have
28 retired after 1986, when the SRBR was implemented, in order to qualify for distributions from
the SRBR. Furthermore, the City Council's Resolution No. 71780, which set forth the
methodology for distributions from the SRBR in 2003, defined "retiree" as "a person who has

1 retired from the Federated City Employees Retirement System under the provisions of the
2 System. 'Retiree' does not include any person who has separated from City service but is not
3 receiving a benefit from the Plan." Again, there is no limitation that a retiree must have retired
4 after a certain date, despite the existence of a different limitation.

5 Thus, as to COLAs, medical and dental plan coverage, and the SRBR, persons who
6 retired before these benefits were enacted have always received these benefits and all
7 improvements related to these benefits. As a result, individuals (*i.e.*, Affected Retirees) who
8 were employed while those benefits or improvements were voluntarily bestowed upon retirees
9 and dependents of deceased retirees thereby acquired a vested right to be eligible for like
10 voluntary benefits or improvements after they retired if the City Council exercised its **sole** and
11 inherent discretion to provide them.

12 Section 1504-A of Measure B, entitled "Reservation of Voter Authority," added an
13 obstacle that did not previously exist with respect to the distribution of additional benefits to
14 Affected Retirees and their beneficiaries by requiring voter approval prior to any such
15 distribution. In that regard, Section 1504-A of Measure B, entitled "Reservation of Voter
16 Authority," states in pertinent part:

17 **Neither the City Council**, nor any arbitrator appointed pursuant to Charter
18 Section 1111, **shall have the authority** to agree to or **provide any increase in**
19 **pension and/or retiree health care benefits without voter approval**, except
20 that the Council shall have the authority to adopt Tier 2 pension benefit plans
21 within the limits set forth herein. (Emphasis added.)

22 The fact that it will be procedurally much more difficult for Affected Retirees and
23 Affected Beneficiaries to receive any future improvements or benefits from the City Council,
24 should it desire to provide them, impairs the vested rights of the Affected Retirees and Affected
25 Beneficiaries.
26
27
28

1 C. Any Right That The City Charter Reserved To The City Council To Modify
2 The Plan Did Not Empower It To Impair Or Otherwise Reduce Vested
3 Benefits Of Individuals Who Already Had Retired Or Their Beneficiaries.

4 The City's major response to this lawsuit is that City employees never obtained vested
5 rights due to the existence of a so-called "reservation of rights" clause contained in Section
6 1500 of the City Charter, which reads:

7 Except as hereinafter otherwise provided, the Council shall provide, by
8 ordinance or ordinances, for the creation, establishment and maintenance of a
9 retirement plan or plans for all officers and employees of the City. Such plan or
10 plans need not be the same for all officers and employees. Subject to other
11 provisions of this Article, the Council may at any time, or from time to time,
12 amend or otherwise change any retirement plan or plans or adopt or establish a
13 new or different plan or plans for all or any **officers or employees**. (Emphasis
14 added.)

15 Similar specific language referencing only officers or employees appears in City
16 Charter Section 1503, which states:

17 Any and all retirement system or systems, existing upon adoption of this
18 Charter, for the retirement of officers or employees of the City, adopted under
19 any law or color of any law, including but not limited to those retirement
20 systems established by Parts 1, 2 and 4 of Chapter 9 of Article II of the San Jose
21 Municipal Code, are hereby confirmed, validated and declared legally effective
22 and shall continue until otherwise provided by ordinance. The foregoing
23 provisions of this Section shall operate to supply such authorization as may be
24 necessary to validate any such retirement system or systems which could have
25 been supplied in the Charter of the City of San Jose or by the people of the City
26 at the time of adoption or amendment of any such retirement system or systems.
27 However, subject to other provisions of this Article, the Council shall at all
28 times have the power and right to repeal or amend any such retirement system or
systems, and to adopt or establish a new or different plan or plans for all or any
officers or employees, it being the intent that the foregoing sections of this
Article shall prevail over the provisions of this Section. (Emphasis added.)

 Because these provisions clearly limit any such empowerment to actions that affect only
officers or employees, **as opposed to retired members**, the City's "reservation of rights"
argument has no bearing on the retirement entitlements already possessed by individuals who
were retired at the time Measure B took effect or their eligible beneficiaries (*i.e.*, Affected
Retirees and Affected Beneficiaries). Consequently, it does not provide authorization for the

1 alterations contained in Measure B which are the subject of the SJREA lawsuit.

2 Under general settled canons of statutory construction, we ascertain the
3 Legislature's intent in order to effectuate the law's purpose. [Citation.] We must
4 look to the statute's words and give them their "usual and ordinary meaning."
5 [Citation.] The statute's plain meaning controls the court's interpretation unless
its words are ambiguous. If the plain language of a statute is unambiguous, no
court need, or should, go beyond that pure expression of legislative intent.

6 *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, quoting *Kobzoff v. Los Angeles County*
7 *Harbor/UCLA Medical Center* (1998) 19 Cal. 4th 851, 861; see also 58 Cal.Jur.3d, Statutes,
8 §§ 83-88, 171.

9 We seek to ascertain the Legislature's intent so that we may effectuate the law's
10 purpose. Our goal is to interpret the language of the statute --not to insert what
11 has been omitted or omit what has been inserted. We look first to the language
12 of the statute itself, read as a whole, seeking to harmonize parts of a statutory
13 scheme. **If the words contained in the statute are reasonably free from
ambiguity and uncertainty, we look no further than those words to
ascertain the provision's meaning.** [Citation.] (Emphasis added.)

14 *Bettencourt v. City and County of San Francisco* (2007) 146 Cal.App.4th 1090, 1100.

15 In construing the statutory provisions a court is not authorized to insert
16 qualifying provisions not included and may not rewrite the statute to conform to
an assumed intention which does not appear from its language. The court is
limited to the intention expressed. [Citations.]

17 *Mares v. Baughman* (2001) 92 Cal.App.4th 672, 677, quoting *People v. One 1940 Ford V-8*
18 *Coupe* (1950) 36 Cal.2d 471, 475; see also 58 Cal.Jur.3d, *supra*, §§ 90-91.

19 "When we interpret a statute, we must avoid an interpretation that would render terms
20 surplusage. Instead, we seek to give every word some significance, leaving no part useless or
21 devoid of meaning." *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th
22 1064, 1081. "While every word of a statute must be presumed to have been used for a purpose,
23 **it is also the case that every word excluded from a statute must be presumed to have been**
24 **excluded for a purpose.**" (Emphasis added.) *Arden Carmichael, Inc. v. County of*
25 *Sacramento* (2001) 93 Cal.App.4th 507, 516; see also 2A N. Singer, *Statutes and Statutory*
26 *Construction* (6th ed. 2000), § 46:06. (Emphasis added.)

27 An application of these clear principles of statutory construction compels the conclusion
28 that any reserved power to amend does not extend to **benefits already provided to retirees or**

1 **their eligible beneficiaries.**

2 Moreover, most significantly, Measure B itself clearly articulates an intent **not** to reduce
3 or impact any benefits already possessed by retirees at the time of its enactment. In particular,
4 Section 1502-A, entitled "Intent," expressly states in its fourth and fifth paragraphs:

5 * * *

6 * * *

7 * * *

8 This Act is not intended to deprive any current or **former employees** of benefits
9 earned and accrued for prior service as of the time of the Act's effective date;
10 rather, **the Act is intended to preserve earned benefits as of the effective date**
11 **of the Act.**

12 This Act is **not intended to reduce the pension amounts received by any**
13 **retiree** or to take away any cost-of-living increases paid to retirees as of the
14 effective date of the Act. (Emphasis added.)

15 This unequivocal intent **not** to reduce, or even impact, the retirement benefits provided
16 to individuals who were retired at the time Measure B took effect, or their eligible
17 beneficiaries, is also reflected in the Argument submitted in favor of Measure B that was signed
18 by the City's Mayor, among others. In particular, the fourth paragraph of the proponents'
19 Argument states:

20 * * *

21 * * *

22 * * *

23 Measure B would protect retirement benefits already earned by current
24 employees but would reduce the cost to the city by making changes going
25 forward. **It would not cut current payments to retirees.** . . . (Emphasis
26 added.)

27 It is well-established that in construing voter initiative language "we refer to other
28 indicia of voter's intent, particularly the analyses in arguments contained in the official
pamphlet." *People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Birkett* (1999) 21 Cal.4th 226,
243.

 From the foregoing, it is abundantly apparent that any rights the City might possibly
have reserved under Sections 1500 *et seq.* of the City Charter to amend or change any

1 retirement plan or establish a new or different plan **only** pertained to current officers or
2 employees. Nothing in the City Charter or any other lawful enactment in any way stated that
3 the retirement benefits awarded to **retirees** could thereafter be amended or changed or that any
4 benefits earned by current employees could be amended or changed **after they retired**.

5 Furthermore, the language of section 1502-A of Measure B set forth above clearly
6 reveals that the City and its electorate understand that retirees have previously earned benefits
7 that must be preserved. Yet, if the City's construction of the so-called "reservation of rights"
8 clause were adopted, there would be no such thing as a "previously earned benefit" because all
9 benefits would be subject to change by the City.

10
11 **D. Even If City Charter Section 1500 et seq. Was Not Construed To Be**
12 **Inapplicable To Retirees, It Cannot Be Interpreted To Empower The**
13 **Impairments Set Forth In Measure B.**

14 Taken to its logical conclusion, the City's "reservation of rights" position means that a
15 municipality can avoid the vested rights doctrine and eliminate all pension benefits earned by
16 the Affected Retirees and Affected Beneficiaries. Were the City allowed to do so, it would
17 render its contract with its employees illusory.

18 Words of promise which by their terms make performance entirely optional with
19 the "promisor" ... do not constitute a promise. Although such words are often
20 referred to as forming an illusory promise, they do not fall within the present
21 definition of promise. They may not even manifest any intention on the part of
22 the promisor. Even if a present intention is manifested, the reservation of an
23 option to change that intention means that there can be no promisee who is
24 justified in an expectation of performance." (Rest.2d Contracts, § 2, com. e, p.
25 10; accord, id., § 77, com. a, p. 195; 1 Corbin on Contracts (rev. ed. 1993) §
26 1.17, p. 47.) "One of the most common types of promise that is too indefinite
27 for legal enforcement is the promise where the promisor retains an unlimited
28 right to decide later the nature or extent of his or her performance. This
unlimited choice in effect destroys the promise and makes it illusory." (1
Williston on Contracts (4th ed. 2007) § 4:27, pp. 804-805, fns. omitted; accord,
1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 230-231, pp.
264-266.) *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal. App. 4th
1425, 1438-1439.

In *Legislature v. Eu* (1991) 54 Cal.3d 492, the California Supreme Court struck down

1 an initiative provision ("Prop 140") which would have terminated the Legislators' Retirement
2 Law ("LRL") as to certain legislators, thereby imposing significant limitations on legislators'
3 previously earned pension rights. Specifically, a section was to be added to Article IV of the
4 California Constitution to provide that the State will contribute the employer's share to the
5 Federal Social Security system on behalf of participating legislators "elected to or serving in
6 the Legislature on or after November 1, 1990," but "[n]o other pension or retirement benefit
7 shall accrue as a result of service in the Legislature, such service not being intended as a
8 career occupation." *Id.* at 502-503. (Emphasis added.)

9 The individuals challenging Prop 140 claimed that it impaired vested rights to pension
10 benefits, whereas its supporters relied on pre-existing language in Article IV, Section 4 of the
11 California Constitution, which provided in pertinent part that "**The Legislature may, prior to
12 their retirement, limit the retirement benefits payable to Members of the
13 Legislature . . .**" *Id.* at 528-529. (Emphasis added.)

14 The Court held that this provision in the Constitution which seemingly allowed the
15 Legislature to limit retirement benefits (Article VI, Section 4) did not prevent the creation of
16 vested rights. Specifically the Court stated (at 529):

17 That provision, seemingly empowering the Legislature to exercise some
18 measure of control over the pension rights of its own members prior to their
19 retirement, may create some uncertainty as to the full amount or extent of a
20 legislator's pension rights during his term of office. **But the provision neither
21 states nor implies that these rights are thus deemed inchoate and
22 unprotected from impairment by the initiative process. Significantly, we
23 have never suggested that the mere existence of article IV, section 4,
24 precludes legislators from acquiring pension rights protected by the state or
25 federal contract clauses. (Cf. *Allen v. Board of Administration*, *supra*, 34
26 Cal.3d at pp. 119-120.)** (Emphasis added.)

27 The Opinion (at 529-530) proceeded on the basis that, consistent with established
28 appellate authority, the limiting language contained in Article IV, Section 4 of the California
Constitution permitted only reasonable modifications to the pension system during the
employment relationship provided the employees receive "comparable new advantages" in
return for any substantial reduction in benefits. The Opinion concluded (at 530) that incumbent

1 legislators had a vested right to earn additional pension benefits through continued service,
2 despite the “potential but unexercised limitations contemplated by article IV, section 4, of the
3 state Constitution.”

4 The so-called “reservation of rights” clause in the City Charter similarly neither states
5 nor implies that any rights provided pursuant to City Charter Section 1500 are inchoate or
6 unprotected from impairment. Therefore, it does not operate to preclude the creation of vested
7 rights.

8 In *Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, the
9 Court analyzed a claim by the city of Santa Ana that any rights or obligations created by a
10 contract with the Southern California Gas Co. were subject to a reservation of rights provision
11 contained in that contract. Specifically, the city contended (at 893) that Section 8(a) of the
12 1938 Franchise allegedly subjects the gas company’s rights to all ordinances “heretofore or
13 hereafter adopted . . . in the exercise of [Santa Ana’s] police powers Read in conjunction
14 with sections 8(b) and 9, Santa Ana contends the gas company expressly acknowledged that its
15 rights under the 1938 Franchise could be altered by future police power ordinances.”

16 The Court rejected the city’s contention, stating (at 893):

17 Santa Ana cannot avoid Contract Clause analysis merely by establishing that the
18 trench cut ordinance is an otherwise legitimate exercise of police power. While
19 the 1938 Franchise may acknowledge the need for further regulation pursuant to
20 Santa Ana’s police power, it does not enable Santa Ana to adopt ordinances that
21 compromise its material terms. (Citations.) We cannot read the 1938 Franchise
22 in a way that reserves to Santa Ana the power to unilaterally alter the terms of
23 the agreement. Such an interpretation is “absurd;” section 8(a) “cannot be
24 applied as broadly and retrospectively as its literal language may suggest.”
(Citations); *See also Energy Reserves Group, Inc. v. Kan. Power & Light Co.*,
459 U.S. 400, 412 n.14, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983) (“When a State
itself enters into a contract, it cannot simply walk away from its financial
obligations.”).

25 Like the contract in *Southern California Gas Co.*, the City cannot walk away from its
26 contractual obligations to its former employees by relying on the so-called “reservation of
27 rights” clause. If the Court was unwilling to enforce a “reservation of rights” clause in a
28 contract where the parties had negotiated the language, it makes no sense that such a provision

1 could be enforced as to the Affected Retirees and Affected Beneficiaries who did not negotiate
2 the language in the City Charter.

3 **E. In Enacting Section 1500 *et seq.* Of The City Charter, The Voters Expressly**
4 **Limited The Ability To Amend The Retirement Plan To The City Council.**

5 A close reading of Section 1500 of the City Charter reveals that all powers granted
6 therein are granted to the City Council.

7
8 Except as hereinafter otherwise provided, the **Council** shall provide, by
9 ordinance or ordinances, for the creation, establishment and maintenance of a
10 retirement plan or plans for all officers and employees of the City. Such plan or
11 plans need not be the same for all officers and employees. Subject to other
12 provisions of this Article, **the Council** may at any time, or from time to time,
amend or otherwise change any retirement plan or plans or adopt or establish a
new or different plan or plans for all or any officers or employees. (Emphasis
added.)

13 In the unlikely event this Court should determine that this language authorizes the
14 reduction or elimination of previously prescribed benefits, it must nevertheless decide that
15 Measure B is unlawful. Any empowerment granted by Section 1500 *et seq.* was given
16 exclusively to the City Council, not the voters. Because the electorate, which enacted Section
17 1500 *et seq.*, confined the ability to make Plan amendments to the City Council, as opposed to
18 reserving that right, the reductions and impairments are unlawful because they were
19 promulgated by the voters, not the City Council.

20 The fact that Section 1500 *et seq.* used the specific term “Council,” as opposed to
21 broader language such as “legislative body” or “governing body,” creates a strong inference
22 that the intent of the voters in enacting that provision was to confine that empowerment to that
23 particular body. *De Vita v. County of Napa* (1995) 9 Cal.4th 763, 776 and *Committee of Seven*
24 *Thousand v. Superior Court* (1988) 45 Cal.3d 491, 501.

25 The language confining any ability to amend to the City Council that appears in Section
26 1500 is consistent with the pre-existing Charter provisions. In 1961, Section 78(b) of the City
27 Charter provided in relevant part:

28 The **Council** in its discretion may at any time, or from time to time, by

1 ordinance, amend or otherwise change the retirement plan or plans established
2 pursuant to said Section 78a or any retirement plan or plans established pursuant
3 to said Section 78a, or adopt or establish a new or different plan or plans for
4 eligible members of the police or fire departments of the City of San Jose.
(Emphasis added.)

5 The 1961 ballot argument in favor of Charter Section 78(b) stated in pertinent part:

6 The purpose of this amendment is to enable the **City Council** to take legal steps
7 to provide survivor benefits for your policemen's and firemen's families . . .
8 SURVIVOR BENEFITS ARE PROHIBITED AT PRESENT IN THE CITY
9 CHARTER! In order to allow the **City Council** to adopt reasonable benefits, it
10 is necessary to amend the City Charter. In other words, this amendment merely
11 unties the hands of your **City Council**...

12 Two years ago, a very long, detailed plan was presented and defeated.
13 Opponents of this plan argued this matter should be referred to the City Council
14 for action and not included as mandatory provisions of the City Charter. This
15 amendment will do just that. This amendment will allow the **City Council** to
16 have legal authority to act on survivor benefits by ordinance and thereby provide
17 protection for widows and orphans. (Emphasis added.)

18 It is clear, both from the language of Section 78b and from the ballot argument in favor
19 of that Section, that the power to adopt and amend pension plans was specifically conferred by
20 the voters on the City Council. Nothing in the subsequent 1965 enactment departed from that
21 limited grant of authority.

22 **F. Section 1515-A Of Measure B Violates The Separation Of Powers Doctrine**

23 Section 1515-A(b) of Measure B, entitled "Severability," states in pertinent part:

24 (b) If any ordinance adopted pursuant to the Act is held to be invalid,
25 unconstitutional or otherwise unenforceable by a final judgment, the matter shall
26 be referred to the City Council for determination as to whether to amend the
27 ordinance consistent with the judgment, or whether to determine the section
28 severable and ineffective."

No analysis of vested rights is required to determine that Section 1515-A constitutes a
violation of the separation of powers among the legislative, executive, and judicial branches
under Article III, Section 3 of the California Constitution as the challenge to Section 1515-A is
a facial challenge. A facial challenge, as opposed to an "as applied" challenge, asks the Court
to consider only the text of the measure itself. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th

1 1069, 1084.

2 In *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245,
3 267, the California Supreme Court discussed the factors a Court is to consider when
4 determining whether the valid portion of a statute struck down in part may remain.

5 A severability clause, although not conclusive, “normally calls for sustaining the
6 valid part of the enactment The final determination depends on whether
7 ‘the remainder . . . is complete in itself and would have been adopted by the
8 legislative body had the latter foreseen the partial invalidation of the statute’
[citation]” (quoting from *Metromedia, Inc. v. City of San Diego* (1982) 32
Cal.3d 180, 190.

9 As it is within the exclusive jurisdiction of the Courts to make the determination as to
10 whether any parts of any ordinances adopted pursuant to Measure B are severable, it is a
11 violation of the separation of powers doctrine to grant that power to the City Council.

12
13 **G. Section 1513-A Of Measure B Violates Article XVI, Section 17 Of The**
14 **California Constitution.**

15 Section 1513-A of Measure B, entitled “Actuarial Soundness (for both pension and
16 retiree healthcare plans),” states in pertinent part:

17 (c) In setting the actuarial assumptions for the plans, valuing the liability of
18 the plans, and determining the contributions required to fund the plans, the
objectives of the City’s retirement boards shall be to:

19 (i) achieve and maintain full funding of the plans using at least a median
20 economic planning scenario. The likelihood of favorable plan
21 experience should be greater than the likelihood of unfavorable plan
22 experience; and

23 (ii) ensure fair and equitable treatment for current and future plan
24 members and taxpayers with respect to the costs of the plans, and
minimize any intergenerational transfer of costs.

25 By enacting Section 1513-A, paragraph (c) of Measure B, the City has violated Article
26 XVI, Section 17(b) of the California Constitution, which states:

27 The members of the retirement board of a public pension or retirement system
28 shall discharge their duties with respect to the system **solely in the interest of,
and for the exclusive purposes of providing benefits to, participants and**

1 **their beneficiaries**, minimizing employer contributions thereto, and defraying
2 reasonable expenses of administering the system. A retirement board's **duty to**
3 **its participants and their beneficiaries shall take precedence over any other**
4 **duty**. (Emphasis added.)

5 Section 1513-A, paragraph (c) of Measure B compromises the Board's fiduciary duties
6 to Affected Retirees and Affected Beneficiaries by compelling the Board to consider the
7 interests of the City's residents and taxpayers on an equal basis with plan participants and their
8 beneficiaries. However, the last sentence of Article XVI, Section 17(b) of the Constitution
9 mandates that the Board's "duty to the participants and beneficiaries shall **take precedence**
10 **over any [possible] other duty**" (emphasis added), including any obligation toward residents
11 and taxpayers to minimize employer contributions.

12 **III. CONCLUSION**

13 For all of the reasons set forth above, SJREA respectfully urges the Court to render its
14 judgment (a) enjoining the City from in any way implementing or enforcing Sections 1504-A,
15 1510-A, 1511-A, 1512-A(b), 1513-A(c) and 1515-A of Measure B; (b) declaring that (1)
16 Sections 1504-A, 1510-A, 1511-A(c) and 1512-A(b) of Measure B unconstitutionally impair
17 vested contractual rights of Affected Retirees and Affected Beneficiaries in violation of the
18 Contract Clause of the California Constitution, (2) Section 1515-A of Measure B violates
19 Article III, Section 3 of the California Constitution; and, (3) Section 1513-A of Measure B
20 contravenes Article XVI, Section 17(b) of the California Constitution; and (c) issue its
21 Peremptory Writ of Mandate commanding the City to return to the SRBR all monies previously
22 transferred from it to another retirement fund or account.

23 Respectfully submitted,

24 SILVER, HADDEN, SILVER, WEXLER & LEVINE

25 Date: July 8, 2013

26 By Stephen H. Silver
27 STEPHEN H. SILVER

28 Attorneys for Plaintiffs/Petitioners San Jose Retired
 Employees Association, Howard E. Fleming, Donald S.
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 Navarro

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the County of Los Angeles, State of California. I am over the age of 18
4 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161,
5 Santa Monica, California 90407-2161.

6 On **July 8, 2013**, I served the foregoing document described as **SJREA'S PRE-TRIAL**
7 **BRIEF** on the parties in this action by placing a true copy thereof enclosed in a sealed envelope
8 addressed as shown on the attached Service List.

9 ☒ **[By Mail]** I am readily familiar with the firm's practice of collection and processing
10 correspondence for mailing. Under that practice, on the same day that correspondence is
11 placed for collection and mailing, it would be deposited with the U.S. Postal Service with
12 postage thereon fully prepaid at Santa Monica, California, in the ordinary course of
13 business. I am aware than on motion of the party served, service is presumed invalid if
14 postal cancellation date or postage meter date is more than one day after date of deposit
15 for mailing in affidavit.

16 ☐ **[By Personal Service - via Magnum Courier]** I caused the above document to be
17 personally delivered to the party represented by an attorney. Delivery was made to the
18 attorney or at the attorney's office by leaving the document, in an envelope or package
19 clearly labeled to identify the attorney being served, with a receptionist or an individual in
20 charge of the office.

21 ☒ **[By Electronic Mail]** I caused the document(s) to the addressee(s) via electronic mail at
22 the addresses shown on the attached service list..

23 ☐ **[By Facsimile Transmission]** I caused the above-referenced document to be transmitted
24 to the named person(s) via facsimile transmission to the fax number(s) set forth above
25 from a fax machine at (310) 395-5801.

26 ☐ **[By Overnight Mail]** I delivered said documents to an authorized courier or
27 driver authorized to receive documents, in an envelope or package designated by the
28 express service carrier with delivery fees paid or provided for, addressed to the person on
whom it is to be served for delivery on the next business day.

Executed on July 8, 2013, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the above
is true and correct.

24 LISA L. HILL



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